

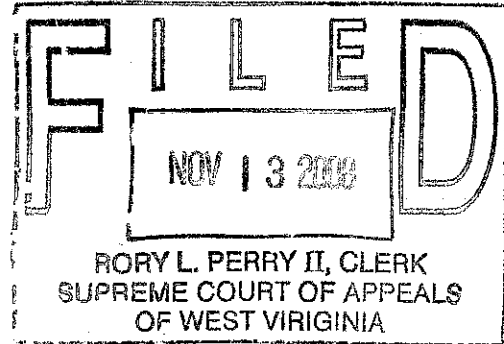
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IN THE
SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON



THOMAS D. SIMPSON,
Appellant,

vs.

Appeal No. 34368
Claim No. 2003-016770
D. O. I. 09/25/2002
BOR Appeal No. 76478

WVOIC,
and INDEPENDENCE COA COMPANY, INC.,
Appellee.

APPELLANT'S BRIEF

TO THE HONORABLE JUDGES OF THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA

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ISSUE PRESENTED

Whether a statutory enactment by the legislature directing the executive to establish legislative rules regarding the level of permanent partial disability for common injuries, which legislative rules are exempt from review and oversight by the legislature, violates the Separations of Powers Doctrine as found in *W. Va. Const. art. 5, §1*.

THE KIND OF PROCEEDING AND NATURE OF THE
RULING IN THE LOWER TRIBUNAL

This is an appeal from an Order of the Workers' Compensation Board of Review dated January 23, 2007 which affirmed a prior order of the Office of Judges dated June 22, 2006, which affirmed the prior order of May 24, 2005 granting a 13% permanent partial disability award. It is from the Board of Review's order dated January 23, 2007 that the Appellant files this appeal.

STATEMENT OF FACTS

The Appellant, Thomas D. Simpson, sustained a significant injury to his back in the course of and as a result of his employment. He was initially seen and treated at the emergency room of Raleigh General Hospital, where he was seen and released. He followed up with his family physician, Dr. Michael Muscari, who provided conservative care and treatment, without improvement.

Due to his persistent symptomatology, he was referred to Dr. Shah Siddiqi, who examined him and recommended a MRI be performed. The MRI revealed a disc protrusion at the L4-5 level, posterolaterally to the right, and impinging on the nerve root. As a result of that finding, Dr. Siddiqi recommended a right L5 microdiscectomy and hemilaminectomy. The microdiscectomy was performed on December 20, 2002.

Unfortunately, Mr. Simpson continued to have significant symptoms associated with his condition, including significant pain, as well as a right L5 radiculopathy, which has been confirmed by EMG/NCS study. Because of continued significant pain and limitations, Mr. Simpson was referred to the University of Virginia, Dr. Mark Shaffrey, as well as The Center for Pain Relief, Dr. Bowman. Dr. Shaffrey reviewed Mr. Simpson's history, his physical findings and the objective diagnostic tests. The lumbar myelogram revealed postoperative changes at the

surgical site, and as noted heretofore, the EMG/NCS revealed a moderate L5 radiculopathy. Dr. Shaffrey indicated there was no good surgical option, and agreed with Dr. Bowman that a trial for a spinal cord stimulator was appropriate. Mr. Simpson did undergo the implant of the spinal cord stimulator as authorized by the Commission.

Mr. Simpson was next evaluated by the Commission's examiner, Dr. George Orphanos. In his report of February 1, 2005, Dr. Orphanos noted Mr. Simpson's history of treatment and examined him thoroughly. He noted Mr. Simpson was using a spinal cord stimulator, but continued to have pain and limitations. Upon his examination, Dr. Orphanos concluded that Mr. Simpson continued to have chronic pain and radiculitis, supported by EMG study as well as the fact that his complaints followed a dermatome distribution. Dr. Orphanos opined that Mr. Simpson should receive supportive treatment regarding his chronic pain. Based upon the AMA Guides to the Evaluation of Permanent Impairment, 4th Ed., Dr. Orphanos found Mr. Simpson was entitled to a 20% impairment. He then applied Rule 20, §VII of 85 CSR 20 and reduced that amount to 13%, finding Mr. Simpson fell into Category III, which would allow 10-13% impairment. He then added that an additional 2% should be granted for the last surgical procedure implanting the spinal cord stimulator and for scarring. Thus, he recommended a 15% impairment.

By order dated March 24, 2005, the claims administrator granted a 13% impairment rating, reducing the recommended rating of Dr. Orphanos.

Dr. Orphanos appeared and testified in this claim on September 28, 2005, and stated that in his opinion, in spite of Rule 20, that Mr. Simpson should be granted an additional 2% impairment for the spinal cord stimulator and scarring. He stated he felt it was consistent with

the AMA Guides and Rule 20. He noted that opinion was expressed to a reasonable degree of medical certainty. (George Orphanos, MD transcript, September 28, 2005).

ASSIGNMENT OF ERROR

The Board of Review erred and was clearly wrong in affirming the Office of Judges order dated June 22, 2006 affirming a 13% permanent partial disability award granted pursuant to state regulation, because the exempt legislative rule (passed without legislative oversight) that was applied in this case (resulting in a reduction of the recommended impairment rating) was the result of an improper delegation of legislative authority to the executive branch in violation of the Separations of Powers Doctrine, *W. Va. Const.* art. 5, §1.

POINTS AND AUTHORITIES AND ARGUMENT

The Appellant, Thomas D. Simpson, seeks this appeal on an issue of first impression – whether the application of an exempt legislative rule, 85 CSR 20, Section VII, Table 85-20-C, (hereinafter Rule 20) enacted by the West Virginia Workers Compensation Commission, before its dissolution as the body statutorily created to administer the West Virginia Workers Compensation Act,¹ is a violation of the Separation of Powers Doctrine, *W.Va. Const. Art. 5, § 1*?

Before its dissolution, and reformation as BrickStreet Mutual Insurance Company, (a monopolistic private workers compensation insurance carrier in West Virginia), the West Virginia Workers Compensation Commission enacted² certain exempt rules known as Rule

¹ Pursuant to W.Va. Code §23-2C-3, the W.Va. Legislature eliminated said Commission and statutorily directed the Insurance Commission for the State of West Virginia to undertake the regulation of the privatized workers compensation system in West Virginia

² Pursuant to W.Va Code §23-4-3b(b)

20, specifically under §VII, Table 85-20-C relating to the lumbar spine.³ The legislative rule acts as a cap on permanent partial disability awards for injuries to the spine.⁴ Rule 20, as currently enacted, is a violation of the Separation of Powers Doctrine, and as such, the regulation cannot constitutionally be applied to Mr. Simpson's claim for benefits.

The issue is one that involves the State Administrative Procedures Act, the Workers Compensation Act and interpretation of the West Virginia Constitution. The issue is one that has not been addressed in the arena of Workers Compensation and therefore, it is imperative that this Court give guidance on the matter.

The State Administrative Procedures Act
as it relates to the legislative rule-making

W.Va. Code Chapter 29 is known as the State Administrative Procedures Act. The State Administrative Procedures Act clearly governs the rule-making procedures in the state of West Virginia. Under section 1 of the Act, the legislature set forth its findings and statement of purpose. It states in part:

“The Legislature further finds that the delegation of its legislative powers to other departments and agencies of government requires of the Legislature that the rules and regulations of such other departments and agencies, which have the force and effect of law because of their legislative character, should be carefully and extensively reviewed by the Legislature in a manner properly respectful of the separation of powers but in keeping with the Legislative force and effect of such rules and regulations.”⁵

Pursuant to such findings and purpose, rules proposed by the executive branch via an administrative agency would be subject to the rule-making procedures of the State

³ §VII, Tables 85-20-D and 85-20-E are companion tables that likewise apply as a cap to the cervical and thoracic permanent partial disability awards.

⁴ Interestingly, many of the officers of BrickStreet, including the president and vice-president/general counsel, held similar positions with the W.Va. Workers Compensation Commission and wrote these rules to which their new, private company is now subject.

⁵ W.Va. Code §29A-1-1

Administrative Procedures Act. Such proposed rules would be submitted to the legislative rule-making review committee pursuant to *W.Va. Code* § 29A-3-11, and then to the full legislature for action pursuant to *W.Va. Code* § 29A-3-12 et. seq. Once a bill passes adopting the legislative rule, it then has the full force and effect of law. In this manner, the legislative body can, and does exert control over unfettered action by the executive branch in creating rules, by reviewing and considering those rules to determine whether they are consistent with the legislative enactment that forms the foundation of the proposed legislative rule. As a result of the act's stated purpose, the legislature maintains control over its constitutional duty to enact laws, preventing the executive branch from enacting law by rule-making fiat, by virtue of the State Administrative Procedures Act.

The Background and legislative history
of the Workers Compensation Act

As this Court is well aware, the workers compensation system was created as an alternative to a civil justice system that worked poorly, resulted in much litigation of work place injuries, and oftentimes provided no coverage for many injured in the course of employment.⁶ The workers compensation system that has evolved has been entirely a legislative creation, setting forth the rules by which injured workers could receive benefits.⁷ Most specifically, the system created by the legislature determined the benefit schedule for injured workers, including the rate of the benefit, the time period for such benefits, when benefits are to be paid, and are not to be paid.⁸ The legislature has determined, by statute, impairment for certain types of common injuries. *W.Va. Code* §23-4-6(f)⁹. The legislature has determined, by statute, detailed rules

⁶ *Larson's Workmen's Compensation Law*, Vol. 1, §5.10, p.36, §4.50, p.31, §5.20-5.30, pp. 37-40

⁷ The right to workmen's compensation benefits is wholly statutory, and they may be paid to claimant only as authorized by law. *Clark v. State Workmen's Compensation Comm'r*, 155 W.Va. 726, 187 S.E.2d 213 (1972).

⁸ *W.Va. Code* §23-4-6(b), *W.Va. Code* §23-4-6(c), *W.Va. Code* §23-4-5, *W.Va. Code* §23-4-2.

⁹ 5% for the loss of the ring finger, 50% for the loss of a hand, 35% for the loss of a foot, for example.

governing how and when permanent total disability benefits are to be considered and granted.¹⁰ Many other examples of instances in the Workers Compensation Act exist to show that it has been the legislature that has determined the rate, level, nature and extent of benefits paid under the Act since its inception.¹¹ Enacting benefits such as these is clearly a legislative act, as it is the *creation* of legal rights¹² and the enactment of specific benefits, particularly as it relates to workers compensation, since such rights did not exist at common law.

It is also relevant to note that the legislature has also eliminated benefits since the initial creation of the workers compensation system, including mental-mental claims¹³, the five percent presumptive award for occupational pneumoconiosis¹⁴, and the second injury fund¹⁵, as well as reducing the rate of benefit payment¹⁶, and limiting the entitlement to permanent total disability awards.¹⁷ It has also determined, by statute, the weighing evidence on the review of claims¹⁸, eliminating the "liberality rule". Once again, it is the legislature branch, not the executive branch that is determining the benefits and legal rights to be granted or denied injured workers. This is consistent with this Court's clearly stated holding that enacting laws is a legislative act, not an executive one.¹⁹

While it is true that the workers compensation system, before its privatization, was part of the executive branch of government, its primary purpose was to administer Chapter

¹⁰ *W.Va. Code* § 23-4-6(i).

¹¹ *W.Va. Code* §23-4-1 (who is eligible for benefits); *W.Va. Code* §23-4-1c (payment of temporary total benefits); *W.Va. Code* §23-4-3 (medical treatment); *W.Va. Code* §23-4-6b (hearing loss claims); *W.Va. Code* §23-4-9 (physical and vocational rehabilitation)

¹² Legislature alone has power and authority to provide benefits for dependents of deceased employee and may impose conditions upon which they may be allowed, and conditions it imposes must be satisfied before allowance may be made. *Terry v. State Compensation Commissioner*, 147 W.Va. 129 S.E.2d 833 (1963)

¹³ *W.Va. Code* §23-4-1f

¹⁴ *W.Va. Code* § 23-4- 8c(b) (1993) (Repl.Vol.1998)

¹⁵ *W.Va. Code* §23-3-1(d)(1)

¹⁶ *W.Va. Code* §

¹⁷ *W.Va. Code* §23-4-6

¹⁸ *W.Va. Code* §23-4-1g

¹⁹ *State v. Grinstead*, 157 W.Va. 1001, 206 S.E.2d 912 (1974)

23 of the West Virginia Code, known as the Workers Compensation Act.²⁰ Its administrative actions included ruling on applications for benefits, reviewing evidence and making administrative rulings on that evidence, determining practices and procedures for operating an efficient system.²¹ The Commission created application forms, hired employees to administer the system, managed the rate collection and rate making process, and otherwise attended to the management of the detailed act as set forth in Chapter 23. What the Commission or its Board of Managers did not do was enact caps on benefits, limit entitlement to benefits beyond those the legislature had established or otherwise go beyond administering and enforcing the law as set forth in Chapter 23.

As the West Virginia Legislature found that the workers compensation system was economically problematic and possibly insolvent, in 2003 it enacted significant and comprehensive reforms to the West Virginia Workers Compensation Act, enacting legislation now known as Senate Bill 2003-013. In enacting that legislation, the Legislature specifically found that "... an imminent threat to the immediate and long term solvency of the fund" existed, and that as a result, "... resolution of the crisis is in the best interest of the public."²² As a result of that finding, the Legislature enacted detailed, significant, and radical changes to the benefit structure, permissible benefits, and administrative structure of the Workers Compensation system as we have come to know it in West Virginia. As the Workers Compensation system is wholly a creature of statute, the Legislature does have plenary powers in affecting such changes, and whether such changes are advisable or not, may properly enact them into law. With that change,

²⁰ *W.Va. Code* §23-1-1 *et. seq.*

²¹ Whether it actually achieved that goal is questionable.

²² *W.Va. Code* §23-1-1.

and later changes designed to privatize the workers compensation system²³, the legislature created the legal circumstance this Court finds before it.

The legislative amendment of
the Workers Compensation Act
and the creation of Rule 20

As noted heretofore, in 2003 the Legislature amended the Workers Compensation Act, making far reaching and significant changes, including such changes as the weighing of evidence by eliminating the liberality rule, the rate of pay for both temporary and permanent benefits, and that impairment resulting from carpal tunnel cannot be considered in determining the threshold for permanent total disability to name but a few²⁴. Included in those reforms was the following language in W.Va. Code §23-4-3b(b):

(b) In addition to the requirements of subsection (a) of this section, on or before the thirty-first day of December, two thousand three, the board of managers shall promulgate a rule establishing the process for the medical management of claims and awards of disability which includes, but is not limited to, reasonable and standardized guidelines and parameters for appropriate treatment, expected period of time to reach maximum medical improvement and **range of permanent partial disability awards for common injuries and diseases** or, in the alternative, which incorporates by reference the medical and disability management guidelines, plan or program being utilized by the commission for the medical and disability management of claims, with the requirements, standards, parameters and limitations of such guidelines, plan or program having the same force and effect as the rule promulgated in compliance herewith. (Emphasis added.)

The Legislature did not attempt to give any specific direction to the executive branch in delegating its authority to promulgate a rule establishing a “range of permanent partial disability awards for common injuries or diseases”. It did not express in the statute any prescribed standards adequate to determine the legislative will, and the language present is insufficient to guide the Commission in the exercise of the power conferred upon it. It does not

²³ *W.Va. Code* §23-2C-1 et. seq.

²⁴ *W.Va. Code* § 23-4-1g, *W.Va. Code* § 23-4-6, West Virginia Code § 23-4-14, *W.Va. Code* §23-4-6(n)(1)(4)(A).

describe what injuries are “common injuries” nor does it provide direction on what the ranges should be for any specific injury. It certainly does not provide any direction that the ranges of awards should have large gaps between them nor does it provide that any maximum limit should be enacted. In essence, the provision in the statute provides no direction, save for the requirement that it establish a “range of permanent partial disability awards for common injuries or diseases”. This action was taken without any legislative oversight of the ruling-making relating to the limits on these statutory permanent partial disability benefits relative to common injuries. The Legislature, for the first time in the long history of the Workers Compensation Act, has delegated to the executive branch the legislative authority to enact limits on benefits for statutorily created benefits for common injuries.

In response to that statutory language, the Board of Managers of the West Virginia Workers Compensation Commission enacted *Title 85, Series 20, VII, §85-20-64 et.seq.* In that exempt legislative rule, the Commission adopted standards for evaluations and specifically set forth impairment ratings available to individuals for thoracic, cervical and lumbar injuries, as well as carpal tunnel claims. Specifically, exempt rule 85 CSR 20 §65.1 adopts the *Guides to the Evaluation of Permanent Impairment* (4th Ed. 1993) (hereinafter AMA Guides) as published by the American Medical Association as the basis for “all evaluations, examinations, reports and opinions with regard to the degree of whole body medical impairment which an injured workers has suffered.” (The AMA Guides have been in use in evaluating injured workers in West Virginia for decades.)

After having set forth the adopted standard for evaluations, the regulations then set forth specific limitations regarding carpal tunnel claims (no more than 6% per hand)²⁵, as

²⁵ W.Va. 85 CSR §20-64.5

well as tables specifically limiting impairment for cervical, thoracic and lumbar injuries.²⁶ The exempt rules specifically require that if the evaluation pursuant to the AMA Guides exceeds those set forth in the tables, then they must be reduced (or theoretically increased) to the ratings set forth on the table.²⁷ Further, the tables have large gaps between categories for which no claimant can receive impairment. For example, under the lumbar spine table §85-20-C, a claimant can receive an award for categories based upon certain enumerated findings. Those categories are Lumbar Category I, no impairment, Lumbar Category II, 5% to 8%, Lumbar Category III, 10% to 13%, Lumbar Category IV, 20% to 23% and Lumbar Category V, 25% to 28%. Finally, regardless of the nature or severity of the spinal injuries, or what impairment rating might be derived by use of the AMA Guides, the exempt rule provides a maximum permanent partial disability award for spinal injuries – 28%. Applying this exempt rule to any particular individual can result in interesting results. For example, if an individual is rated under the AMA Guides at 19%, but they fall into category II, they can receive no more than 8%. An individual can undergo back surgery, and receive the same award as an individual who did not. No one can receive an award of 9%, 14% to 19%, 24%, or over 28%, regardless of the nature, severity and duration of their back injury. Even if someone is rendered immobile, their impairment is limited to the provisions of the exempt rule.²⁸ Once an individual reaches the maximum in any given category, regardless of any worsening of the back injury, they can get no further award, unless they change categories. The statutory entitlement to a permanent partial disability award for back injuries (and other common injuries, whatever they may be defined as),

²⁶ W.Va. 85 CSR §§20-64.2, 20-64.3, 20-64.4 and Tables §§85-20-C, 85-20-D and 85-20-E

²⁷ W.Va. 85 CSR §20-64.1

²⁸ An individual who is paralyzed at the waist due to a spinal injury would be limited to no more than 28% based upon application of W.Va. 85 CSR §85-20-C.

which entitlement was created by legislative enactment, has been undoubtedly altered and limited by executive action which was not subject to any rulemaking oversight.

It cannot be stressed enough of the paramount importance of the fact that Rule 20 was not enacted by the legislature, but was an exempt legislative rule adopted by the Board of Managers. This rule was promulgated, without legislative oversight, without legislative review, and without legislative enactment. The regulation was not "carefully and extensively reviewed by the Legislature in a manner properly respectful of the separation of powers" as set forth in *W.Va. Code* § 29A-1-1. They were not reviewed, because in the instance of rule-making relating to the Workers Compensation Act, rules proposed by the Board of Managers to govern administration of workers compensation were not subject to legislative approval as would otherwise be required under *W. Va. Code* §29A-3-1 et. seq.²⁹. Thus, there is no legislative oversight of any kind as regards legislative rules promulgated by the executive branch in instances relating to workers compensation regulations. The executive branch is given unfettered regulatory control of the benefits provided in the system, and may enact what regulations it sees fit without the Legislature's consent or dissent. The result of this failure to maintain some control is that the executive branch can, as it has in this instance, exert power that is constitutionally impermissible – that being the action of enacting law, under the guise of a legislative rule. The executive can, without any legislative oversight, confound the will of the legislature by enacting rules inconsistent with the intent of the legislature. The action of the legislature in enacting the provision of *W.Va. Code* §23-4-3b(b) providing for the executive branch to determine a range of permanent partial disability awards for common injuries in the absence of legislative rulemaking oversight cannot be seen as anything other than the legislature

²⁹ Nor is the Insurance Commission's rule making currently subject to legislative review under the Workers Compensation Act, pursuant to *W. Va. Code* §§ 23-2C-5(c)(2) and 33-2-10(b).

delegating its authority to enact law to the executive branch, in violation of the Separation of Powers Doctrine set forth in the West Virginia Constitution.

The Separation of Powers Clause
and its application to Rule 20

The Separation of Powers Clause of the West Virginia state constitution provides in relevant part that "[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others[.]" W. Va. Const. art. 5, § 1. Thus, unlike the federal constitution where the doctrine is inherent, West Virginia has specifically enumerated in its constitution that each branch of government is separate, and cannot exercise powers belonging to another. The doctrine of separation of powers is part of the fundamental law of West Virginia and, as such, it must be strictly construed and closely followed. *State ex. rel. Rist v. Underwood*, 206 W.Va. 258, 524 S.E.2d 179 (1999). The language of Article 5, §1 of the West Virginia Constitution is "clear and free from ambiguity and its requirement of separation of powers was to be strictly enforced."³⁰ Thus, it is paramount that where the executive engages in rule-making that is not subject to legislative oversight such action must be given close scrutiny by this court.

In discussing the Separation of Powers Doctrine, the West Virginia Supreme Court of Appeals in *State ex. rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee*, 213 W.Va. 255, 580 S.E.2d 869 (2003) stated:

"This separation is deemed to be of the greatest importance; absolutely essential to the existence of a just and free government. This is not, however, such a separation as to make these departments wholly independent; but only so that one department shall not exercise the power nor perform the functions of another. (emphasis added.) They are mutually dependent, and could not subsist without the aid and co-operation of each other. Under the constitutions, the legislature is

³⁰ *State ex. rel. State Bldg. Commission v. Bailey*, 151 W.Va. 79, 150 S.E.2d 449 (1966).

empowered to make laws; it has that power exclusively; the executive has the power to carry them by all executive acts into effect, and the judiciary has the exclusive power to expound them as the law of the land between suitors in the administration of justice. (Emphasis added.) The legislature can do no executive acts, but it can legislate to regulate the executive office, prescribe laws to the executive which that department, and every grade of its officers, must obey. The legislature cannot decide cases, but it can pass laws which will furnish the basis of decisions, and the courts are bound to obey them. The functions of each branch are as distinct as the stomach and lungs in our bodies. They are intended to co-operate; not to be antagonistic; they are functions in the same system; when each functionary does its appropriate work no interference or conflict is possible.' *State v. Harden*, 62 W.Va. 313, 371-72, 58 S.E. 715, 739 (1907) (quoting Lewis' *Suth. Stat.Cons.* §2).

Addressing this state's separation of powers provision, we recognized in syllabus point one of *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981), that Article V, section 1 of the Constitution of West Virginia which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed. As we acknowledged in *Sims v. Fisher*, 125 W.Va. 512, 25 S.E.2d 216 (1943), this Court has expressed "a policy of strong adherence to the several constitutional provisions relating to the separation of powers." *Id.* at 524, 25 S.E.2d at 222.

In considering this argument, it is asserted that the amount and level of benefits is not an executive function, but a legislative one. Being a system created entirely by legislative act, the amount, level and type of benefits to be paid under the Workers Compensation Act are rights conferred upon covered workers in West Virginia by the legislative branch in furtherance of its duty to enact laws. The benefits set forth therein are the result of legislative debate, consideration, and enactment. They are the result of political efforts by constituencies in the state of West Virginia. They are subject to the political will of the people. As this Court has stated, "The authority to enact laws, being exclusively a legislative function, cannot be transferred or abdicated to others." *State v. Grinstead*, 157 W.Va. 1001, 206 S.E.2d 912 (1974). Additionally, in *State ex. rel. West Virginia Citizens Action Group, Id.*, this Court stated "Under

the constitution, the legislature is empowered to make laws; it has that power exclusively; the executive has the power to carry them by all executive acts into effect..."

The Workers Compensation Act, being entirely a creature of statute, is a legislative enactment. An enactment such as the Workers Compensation Act may even become law without the assent of the executive, as it may become law without the signature of the governor, or the legislature may override the governor's veto.³¹ Further, Article 6, §28 of the *West Virginia Constitution* makes it clear that bills and resolutions originate in either house, not in the executive branch. Creating a statutory right to benefits where one did not exist is a uniquely legislative action. The executive does not create or eliminate statutory rights. That is what makes the determination of the nature and extent of permanent partial disability awards a legislative action. This is distinguished from the process of the executive branch engaging in rule-making, which is utilized by the executive in order to set forth policies and procedures to carry out the will and intent of the legislature in a given act. However, as stated heretofore, even the legislative rule-making process is subject to the will of the legislature, since legislative rules are subject to legislative oversight, and it must pass upon the rule by legislation effectuating it,³² except in the instance of the workers compensation act, which is exempt from such legislative oversight. That is where Rule 20 runs afoul of the Separation of Powers Doctrine.

In the instance of Rule 20, the Legislature has statutorily delegated to the executive branch the authority to promulgate rules which determine a "range of permanent partial disability awards for common injuries or diseases."³³ The Legislature, which created the permanent partial disability benefit in the first instance, has by this action delegated to the

³¹ *W.Va. Const. Art. 7, §13.*

³² *W.Va. Code §29A-1-1 et. seq.*

³³ *W.Va. Code §23-4-3c.*

executive branch the ability and authority to change, alter, limit and cap that benefit, without sufficient standards, direction and guidance³⁴ and, clearly, without any legislative oversight. By directing the executive to do so, and by delegating the authority to do so, the Legislature has violated the Separation of Powers Doctrine.³⁵

Rule 20 is a specific action by the executive to limit and constrain benefits for permanent injury, and is not simply the act of implementing, carrying into effect or enforcing specific statutory enactments relating to such benefits. It is not simply setting regulations for the standards and parameters for the evaluation process itself. This rule is, by its very act, creating law and determining the amount and level of benefits. The West Virginia Supreme Court of Appeals noted the distinction between the three branches in *State ex. rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee*, 213 W.Va. 255, 580 S.E.2d 869 (2003). In that case, the Court stated "In *Manchin*, we outlined the division of powers and responsibilities among the three branches of state government: "Generally speaking, the Legislature enacts the law, the Governor and the various agencies of the executive implement the law, and the courts interpret the law, adjudicating individual disputes arising thereunder." 167 W.Va. at 168, 279 S.E.2d at 631 (citing W.Va. Const. art. VI, § 1; art. VII, § 5; art. VIII, § 1); see also *264 **878 *Springer v. Govt. of Philippine Islands*, 277 U.S. 189, 202, 48 S.Ct. 480, 72 L.Ed. 845 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.")." In the instance of Rule 20, the executive is

³⁴ The Legislature may not vest uncontrolled discretion in the Executive to promulgate rules and regulations, but must provide sufficient standards or policy for guidance. *Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981); see also, *State ex. rel. Mountaineer Park, Inc., v. Polan*, 190 W.Va. 276, 438 S.E.2d 308 (1993).

³⁵ The authority to enact laws, being exclusively a legislative function, cannot be transferred or abdicated to others. *State v. Grinstead*, 157 W.Va. 1001, 206 S.E.2d 912 (1974); A direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government violates the separation of powers doctrine. *Appalachian Power Co. v. Public Service Comm'n of W.Va.*, 170 W.Va. 757, 296 S.E.2d 887 (1982).

enacting law, not simply enforcing it or appointing agents to enforce it. Clearly, if the legislature wanted to enact Rule 20 into law, it has the constitutional authority to do so. However, the executive branch cannot do so under the guise of rule-making authority, regardless of how it interprets *W.Va. Code* §23-4-3b(b). The Legislature cannot delegate such authority, and the executive cannot assume such authority; to do so would be a fundamental violation of the Separation of Powers Doctrine and violate *West Virginia Constitution*, Article 5 §1.

Certainly, there are many instances where the failure to provide legislative oversight for rule-making in the arena of workers compensation would not necessarily run afoul of the Separation of Powers Doctrine. Examples include rules designed to provide administrative procedures for filing claims, providing for the administrative monitoring of claims, rules for hearings, setting standards for self insured employers in administering claims, for settlement of claims, and for vocational rehabilitation to name but a few. In each of these instances, the executive would simply be providing an administrative framework for carrying out the stated legislative will, and would not be determining the nature or extent of benefits. In each instance, the executive would simply be making rules to enforce the statutory directives of the legislature.³⁶ In a recent case before this Court regarding legislative rules governing workers compensation, it was stated in syllabus point 7 of *Lovas v. Consolidation Coal Co*, 222 W.Va. 91, 662 S.E.2d 645 (2008): “*West Virginia* 85 CSR § 1-13.1 (2007) is void because it does not reflect the intention of the legislature as expressed in *West Virginia Code* § 23-4-16(a)(4) (2005) (Repl.Vol.2005), especially as the rule has been administered since promulgation. The administrative closure accomplished through the regulation inaccurately connotes that the claim has been closed notwithstanding the contrary language of *West Virginia Code* § 23-4-16(a)(4).”

³⁶ There are other instances in Rule 20 where the executive is going beyond its authority by limiting or changing statutory rights of individuals. Those are the subject of another day.

Had there been proper legislative oversight regarding that legislative rule, much confusion, and ultimately, much litigation could have been avoided. This is one concrete example of what a lack of oversight by the legislature can create when it comes to rule-making. The executive branch can begin creating rules that go far beyond the intent of the legislature and extend into the realm of creating or eliminating new rights. It is in this environment that Rule 20 has been given the force and effect of law, without being enacted into law by the legislature, whether through amending the statute or by legislative rule-making oversight.

As to the case in chief, the claims administrator's examiner, Dr. George Orphanos, presented his report after examining Mr. Simpson. In that report, he expressed the opinion based upon his findings as they are interpreted under the AMA Guides that Mr. Simpson suffered from a 20% permanent partial disability award as a result of his back injury, subsequent surgery, post operative changes and the need for a spinal cord stimulator. His opinion is the sole evidence of impairment in this case, and represents the proper rating under the AMA Guides, without the taint of the application of Rule 20 being applied. Thus, the proper award for Mr. Simpson is 20%.³⁷

Ordinarily, there is presumption that legislation is constitutional, and negation of legislative power must be shown clearly, in light of constitutionally required principle of separation of powers among judicial, legislative, and executive branches of state government. *Lewis v. Canaan Valley Resorts, Inc*, 185 W.Va. 684, 408 S.E.2d 634 (1991). Having noted that presumption, it is for the West Virginia Supreme Court of Appeals to enforce the true meaning, intent, and purpose of constitutional provision relating to separation of powers rather than encourage departure therefrom. *State v. Huber*, 129 W.Va. 198, 40 S.E.2d 11 (1940). In

³⁷ In one final aside it must be noted that counsel for the appellant has multiple claims of a like nature to this one currently in litigation in the workers compensation system. The application of Rule 20 is impacting every worker in West Virginia who suffers an injury to their spine. Some, of course, are more gravely impacted than others.

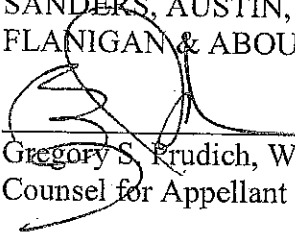
reaching a conclusion regarding whether one branch of government seeks to exercise or impinge upon powers conferred on another branch, where it so finds such action, the Supreme Court of Appeals is compelled to restrain such action. *Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981). Mr. Simpson asks this Court to restrain the West Virginia legislature from improperly delegating its authority upon the executive branch, and to restrain the executive branch from acting upon such improper authority, by holding that 85 CSR 20, Section VII, Table 85-20-C (and its companion rules 85-20-D and 85-20-E) are void and of no effect as they were enacted in violation of *West Virginia Constitution*, Article 5 §1.

PRAYER FOR RELIEF

For these reasons and all other reasons apparent from the record, the petitioner, Thomas D. Simpson, respectfully prays that the Order of the Workers' Compensation Board of Review entered on January 23, 2007 be reversed and set aside and that an order be entered declaring the enactment and application of 20 CSR 85, Table §85-20-C to all workers compensation claims is in violation of the Separation of Powers Doctrine, *West Virginia Constitution*, Article 5 §1, and directing the Insurance Commission and all claims administrator's to cease applying the applicable regulations and tables in determining permanent partial disability in Workers Compensation claims. And further, that Mr. Simpson be granted a 20% permanent partial disability award as recommended by the Commission's examining physician.

Respectfully submitted this the 12th day of November, 2008.


SANDERS, AUSTIN,
FLANIGAN & ABOULHOSN



Gregory S. Prudich, W. Va. State Bar No. 4362,
Counsel for Appellant

CERTIFICATE OF SERVICE

I, Gregory S. Prudich, counsel for petitioner, do hereby certify that I have served a copy of the foregoing **APPELLANT'S BRIEF**, upon Workers' Compensation Defense Division and Independence Coal Company, Inc., the employer, by mailing a true copy thereof by United States mail, postpaid to their addresses, Workers' Compensation Defense Division, P. O. Box 4318, Charleston, West Virginia 25364-4318 and Independence Coal Company, Inc., c/o Sean Harter, Esq., P.O. Box 11271, Charleston, WV 25329 on this the 12th day of November, 2008.



Gregory S. Prudich
Counsel for Petitioner